APR 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1153

UNITED STATES OF AMERICA, *Petitioner,*

v.

WILLIAM GREEN CONSTRUCTION CO., INC. *et al.*
Respondents.

No. 73-1314

WILLIAM GREEN CONSTRUCTION CO., INC. *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENTARY BRIEF OF PETITIONER IN NO. 73-1314 AND RESPONDENT IN NO. 73-1153

MICHAEL J. MALLEY
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel:

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
VIRGINIA M. DONDY

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

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Pursuant to Rule 24(5), Respondent in No. 73-1153 and Petitioner in No. 73-1314, respectfully calls the Court's attention to the case of *National Factors, Inc.* v. *United States,* Court of Claims No. 93-63, decided March 20, 1974.

In that case, the Court of Claims decided that:

> the termination of a contract for the convenience of the government is valid only in the absence of bad faith *or a clear abuse of discretion.* Slip op. at 4 [emphasis added].

The clear implication of this holding is that where the Government's termination of a contract is a clear abuse of discretion, there is a breach of contract over which the Court of Claims has *de novo* jurisdiction under *United States* v. *Anthony Grace & Sons,* 384 U.S. 424 (1966). The *National Factors* decision is important to the disposition of the two petitions before this Court because it highlights the fact that, under normal doctrines of Government contract law, a clear abuse of discretion cannot be used to convert a wrongful termination into a termination for the convenience of the Government. A wrongful termination in such a case remains what it has always been: a breach of contract redressable only in the Court of Claims.

Green's opposition to the Government's petition in No. 73-1153 points out that there are independent grounds for supporting the Court of Claims' disposition. One of those grounds is that the Court of Claims should have completely denied the Government's motion to dismiss, because Green's petition on its face alleges a breach of contract to which the doctrine of exhaustion of administrative remedies is inapplicable, (Brief in opposition at 14). The facts alleged in Green's complaint in the Court of Claims in this case are sufficient to require a finding that the Government's action resulting in termination of the FOB contract was a clear abuse of discretion and thus is a breach of contract. Specifically, it was alleged that the Government was told that Green would complete FOB, which was

guaranteed by USF&G's performance and payment bonds and that the Government was warned that a set-off of its Howard contract claim against the FOB contract would inevitably bankrupt Green and result in abandonment of the FOB contract.

In its cross-petition in No. 73-1314 which is conditioned upon this Court's action on the Government's petition, Green seeks direct review of that portion of the Court of Claims' opinion rejecting Green's breach of contract claim. That petition contends that the concept of termination for the convenience of the Government cannot and should not be stretched so far as to cover cases (such as FOB) where the contract is not in default, the Government wants, indeed, demands, completion of the contract, and the Government itself acts in such a fashion as to make completion impossible. In *National Factors, supra,* the Court of Claims now appears to have recognized this principle in holding that a breach claim was maintainable in that case. For that reason Green wishes to bring this recent decision of the Court of Claims to this Court's attention.

Respectfully submitted,

MICHAEL J. MALLEY
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel:

STANLEY C. MORRIS, JR.
JAMES V. DOLAN
VIRGINIA M. DONDY

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

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